

1                   **IN THE UNITED STATES DISTRICT COURT**  
2                   **FOR THE SOUTHERN DISTRICT OF TEXAS**  
                  **BROWNSVILLE DIVISION**

3   STATE OF TEXAS, ET AL                   )           NO. 1:18-CV-68  
  )  
4    )  
5   VS.                                        )           Houston, Texas  
  )           10:00 a.m.  
  )  
6   UNITED STATES OF AMERICA, ET        )           OCTOBER 14, 2022  
   AL                                        )

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10   **HEARING**

11   **BEFORE THE HONORABLE ANDREW S. HANEN**

12   **UNITED STATES DISTRICT JUDGE**

13   **VOLUME 1 OF 1**

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15   APPEARANCES:

16   FOR THE PLAINTIFFS:

17       Mr. William Thomas Thompson  
18       Mr. Ryan Walters  
          Office of the Attorney General of Texas  
19       209 W 14th Street  
          8th Floor  
20       Austin, TX 78701  
          Tel: 512-936-2266  
          Email: Will.thompson@oag.texas.gov  
               Ryan.walters@oag.texas.gov

21   FOR THE MOVANT, STATE OF NEW JERSEY:

22       Mr. Mayur P. Saxena  
23       New Jersey Office of the Attorney General  
24       25 Market Street, 8th Floor  
          Trenton, NJ 08625  
          Tel: 609-376-2702  
25       Email: Mayur.saxena@njaoag.gov

1 FOR THE INTERVENOR-DEFENDANTS:

2 Ms. Nina Perales  
Ms. Samantha Serna  
3 MALDEF  
110 Broadway  
4 Suite 300  
San Antonio, TX 78205  
5 Tel: 210-224-5476  
Email: Nperales@maldef.org  
6 Sserna@maldef.org

7 FOR THE DEFENDANT THE UNITED STATES OF AMERICA:

8 Mr. James Joseph Walker  
U.S. Department of Justice  
9 Office of Immigration Litigation  
PO Box 868  
10 Washington, DC 20044  
Tel: 202-616-1246  
11 Email: James.walker@usdoj.gov

12 Mr. Daniel David Hu  
Office of the US Attorney's Office  
13 1000 Louisiana  
Suite 2300  
14 Houston, TX 77002  
Tel: 713-567-9518  
15 Email: Daniel.hu@usdoj.gov

16 COURT REPORTER:

17 Ms. Kathleen K. Miller, CSR, RMR, CRR  
515 Rusk, Room 8004  
18 Houston, Texas 77002  
Tel: 713-250-5087  
19

20 Proceedings recorded by mechanical stenography.

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1 (Court called to order.)

2 THE COURT: Be seated. All right. We are here  
3 in 18-CV-68, Texas vs. The United States. Who do I have  
4 representing the plaintiffs?

10:01:47 5 MR. THOMPSON: Will Thompson from the office of  
6 the Attorney General, Your Honor. With me is my colleague  
7 Ryan Walters.

8 THE COURT: All right. Ms. Perales, welcome  
9 back. Who is at your table?

10:01:58 10 MS. PERALES: Good morning, Your Honor. Nina  
11 Perales for the DACA recipient defendant-intervenors. With  
12 me today is my colleague Samantha Serna from MALDEF. And  
13 also in the courtroom today, Your Honor, are several of the  
14 DACA recipient defendant-intervenors themselves: Esther  
10:02:21 15 Joen, Jung Woo Kim, Karina Ruiz de Diaz, other affected  
16 individuals, as well as some parents and members of the  
17 public.

18 THE COURT: Okay. And representing New Jersey  
19 there?

10:02:34 20 MR. SAXENA: Good morning, Your Honor. Mayur  
21 Saxena, Assistant Attorney General, representing New  
22 Jersey.

23 THE COURT: All right. Thank you. And,  
24 Mr. Hu, at your table?

10:02:43 25 MR. HU: Good morning, Your Honor. I have

1 James Walker from Department of Justice, Washington.

2 THE COURT: All right. I mean, y'all may have,  
3 because you're involved in the appeal, have anticipated the  
4 Fifth Circuit opinion coming out. I didn't. I mean, you  
10:03:06 5 know, I had no idea when it comes out and, you know, I get  
6 this order that says, Oh, by the way, you need to decide  
7 something really quickly.

8 And so I really am soliciting everyone's  
9 input here on how we do what we need to do, which I guess I  
10:03:31 10 need to do in the next two weeks.

11 Mr. Thompson, why don't I start with you.  
12 What is it you think I need to do to follow the Fifth  
13 Circuit's directives, and from your standpoint how should I  
14 go about it?

10:03:51 15 MR. THOMPSON: Thank you, Your Honor. Would  
16 you prefer me at the podium?

17 THE COURT: Sure.

18 MR. THOMPSON: Your Honor, I think there's a  
19 threshold question that can kind of control whether we're  
10:04:04 20 in an emergency posture or not. As I understand this  
21 Court's existing injunction, it enjoins the United  
22 States -- it enjoins the United States from granting new  
23 DACA applications, and that is true under the memo, and  
24 it's equally true under the rule.

10:04:21 25 So at least as I understand the United

1 States's position, they would not be granting new DACA  
2 applications even after the effective date of this new rule  
3 because of the current injunction. So long as that is  
4 true, then I think we're maintaining the status quo. There  
10:04:38 5 are no new reliance interests being potentially created or  
6 anything like that, and we can proceed at a kind of normal  
7 pace. If that is not accurate, then the Plaintiff States  
8 believe we would need to act much more expeditiously.

9 THE COURT: All right. Mr. Hu, Mr. Walker, you  
10:04:54 10 want to weigh in on that topic? I hate to make y'all come  
11 up here, but if you are not near a microphone, it's really  
12 hard for us to hear you.

13 MR. WALKER: Sure. Good morning, Your Honor.

14 The government has expressed its agreement  
10:05:10 15 in the Fifth Circuit and before this Court that the  
16 injunction would apply equally to the new rule. But in  
17 that event, the government also would take the position  
18 that it would be appropriate to move expeditiously as the  
19 Fifth Circuit has asked us to.

10:05:24 20 THE COURT: And I don't mind doing that. I  
21 mean, I -- really, I have done nothing but read the *Federal*  
22 *Register* here for the last week. But it's the government's  
23 position that you're not going to be granting on October  
24 31st, or November 1st, any new DACA applications?

10:05:45 25 MR. WALKER: That is correct, Your Honor. DHS

1 has expressed that publicly and we have expressed it to the  
2 Court here. As long as the Court's understanding is the  
3 same, that the injunction does apply to the new rule, then  
4 DHS will continue to move forward with not granting new  
5 DACA requests.

10:05:59

6 THE COURT: All right. Well, that takes some  
7 of the time pressure off.

8 Let's go to the next topic, and that  
9 again, Mr. Thompson, I am going to put the ball in your

10:06:12

10 court. The government at least, I don't know if we are  
11 going to call it new DACA, DACA 2, whatever, we're -- has  
12 gone through a notice and comment procedure. Is that off  
13 the table now?

14 MR. THOMPSON: Right, Your Honor. So the Fifth  
15 Circuit decided the notice and comment issue as to the 2012  
16 memo. We believe that's, you know, correct and there is no  
17 reason to disturb any of that part of the judgment. But as  
18 to the notice and comment rule-making procedure that has  
19 been completed, I don't anticipate making a notice and  
20 comment argument about that.

10:06:48

21 I believe the substantive argument, on the  
22 other hand, remains equally valid. I actually think my  
23 friend on the other side agrees with me about that, that  
24 the new rule expressly says that it is preserving and  
25 fortifying DACA. It is not rescinding DACA. It is not

10:07:04

1 materially changing the substance of DACA.

2           The Fifth Circuit explained the DOJ had  
3 represented that, "None of the changes in the final rule  
4 are material." DOJ explained that in the 28(j) letter that  
10:07:21 5 they filed in that court. So I believe Your Honor's  
6 rulings continue to apply, and the Fifth Circuit's  
7 affirmance continues to apply. So, I think that's -- there  
8 is not as much to do on remand as there could have been.

9           THE COURT: Okay. Mr. Walker, what's your  
10:07:43 10 position on that?

11           MR. WALKER: Yes, Your Honor. We do think the  
12 question of notice and comment is resolved with the rule  
13 having been put through that process now. I don't think I  
14 agree, or we would agree that the new rule doesn't rescind  
10:08:05 15 the 2012 memo. I believe it does expressly rescind that  
16 memo. We're treating it as of October 31st that that memo  
17 is rescinded, and so it's strictly the regulation that  
18 would control DACA moving forward.

19           THE COURT: Well, I think what Mr. Thompson --  
10:08:19 20 the way I read Mr. Thompson is that the Fifth Circuit ruled  
21 that old DACA, the 2012 memo, violated the substantive  
22 portions of the APA. And since the new DACA, the rule  
23 that's been promulgated is the same rule and, I mean, I  
24 read the proposed rule and the final rule in the *Federal*  
10:08:57 25 *Register* where I read DHS saying, yes, this is the same

1 rule. I mean, they tweaked it a little bit here and there.

2                   The way I hear Mr. Thompson argue is  
3 that -- I mean, it's not quite a law, the case argument,  
4 but it is close to that, saying the Fifth Circuit's ruled,  
10:09:15 5 so you got to follow the Fifth Circuit Judge. You know,  
6 he's basically saying, I am bound almost by law, you know,  
7 by precedent to hold it substantively fatal, right?

8                   MR. WALKER: I wouldn't be prepared to agree  
9 with that statement today, Your Honor. We do agree that  
10:09:39 10 we're in a spot with this ruling from the Fifth Circuit.  
11 The government continues to disagree with this Court's  
12 holdings on DACA's lawfulness, on the Fifth Circuit's  
13 holdings on DACA's lawfulness. And so --

14                   THE COURT: Oh, I understand that. But,  
10:09:59 15 Ms. Perales, you want to weigh in on this or if the state  
16 of New Jersey wants to weigh in, let's talk about what it  
17 is I need to decide and how I need to go about it.

18                   MS. PERALES: Thank you, Your Honor.  
19 Defendant-intervenor DACA recipients are generally in  
10:10:21 20 agreement with the position set out by the plaintiffs and  
21 the defendants. The DACA rule rescinds and replaces the  
22 2012 DACA memo that's in the rule itself, and we believe  
23 that the procedural APA claims are no longer live as a  
24 result, and that the Fifth Circuit has asked this Court to  
10:10:46 25 evaluate the lawfulness of the new DACA rule.



1                   Unlike defendants, defendant-intervenor  
2 DACA recipients have not taken the position that they are  
3 so substantively similar that the outcome is foretold. We  
4 certainly want the opportunity to do, as the Court has been  
10:11:06 5 doing, a careful review of the new rule and the  
6 administrative record before taking a position on the  
7 merits here.

8                   THE COURT: Okay. Let me -- you bring up a  
9 point that is on my things-to-do list here. I don't have  
10:11:22 10 an administrative record. Is someone going to file that  
11 with the Court?

12                  MS. PERALES: Perhaps I could step aside for  
13 Mr. Walker.

14                  THE COURT: In fact, I had Rhonda check this  
10:11:39 15 morning to make sure, and I still don't have it.

16                  MR. WALKER: Yes, Your Honor. The  
17 administrative record is fairly voluminous in this case.  
18 Of course, the agency was anticipating this, and so it's  
19 more or less collected. We are working through getting it  
10:11:52 20 together. We would expect within the next three, maybe  
21 four weeks to have it ready for the parties.

22                  THE COURT: Okay. And what -- give me an idea  
23 when you say voluminous. Make my day here.

24                  MR. WALKER: I apologize. I haven't seen the  
10:12:07 25 record. I couldn't speak directly to how large it is. I

1 am waiting for more information from the agency itself on  
2 what they have gathered. So we should hopefully know that  
3 early next week.

4 THE COURT: What all would be in it? I would  
10:12:21 5 guess all the comments.

6 MR. WALKER: We discussed -- given the size of  
7 the comments, we thought it better to reference those since  
8 they're still publicly available. I think it's more of  
9 there are eleven internal documents that were considered  
10:12:38 10 the previous administrative record, the previous versions  
11 of DACA.

12 THE COURT: Okay. Now, that, I have read. So,  
13 I mean, I have read the prior administrative record.

14 MR. WALKER: Right. And so I couldn't speak  
10:12:48 15 more specifically to everything that they included. I  
16 don't want to misspeak here and represent that there will  
17 be something in there that won't be. But it's sort of a  
18 gathering of the information that the agency, you know,  
19 considered in its course of putting the rule together.

10:13:03 20 THE COURT: Okay. I think -- well, let me --  
21 let me let New Jersey weigh in before -- don't go anywhere,  
22 Mr. Walker.

23 MR. WALKER: Sure.

24 THE COURT: Stay right here. You're fine from  
10:13:22 25 there as long as you speak into the mic.

1 MR. SAXENA: Your Honor, I will speak from  
2 here.

3 THE COURT: Yeah.

4 MR. SAXENA: I think you asked about steps  
10:13:28 5 going forward. I think you're right that we're all  
6 operating in a bit of a position of ignorance. We don't  
7 have the administrative record. It may be that, you know,  
8 depending on what is in the administrative record, this  
9 matter could proceed quite expeditiously, but we're just  
10:13:44 10 not in a position to say today, you know, to commit to that  
11 kind of course.

12 We do think that it's -- a potential next  
13 step could be that the parties could meet and confer  
14 regarding a potential schedule, should this matter proceed  
10:14:00 15 on a summary judgment track once the administrative record  
16 is filed.

17 We also would just query the necessity of  
18 either amending the complaint or having a pleading in this  
19 case that actually references the final rule. It may be  
10:14:18 20 that it's not necessary, given the position that the  
21 Department of Justice has taken. But that is something  
22 that should just be resolved so that the process is  
23 orderly.

24 THE COURT: Okay. Well, it sounds to me like  
10:14:35 25 whatever schedule -- and I am fine with y'all coming up

1 with it. But, it's -- it's going to be dependent on when  
2 everybody gets the record. So you need -- so we ought to  
3 do it from -- the schedule ought to, like, kick off from  
4 when the record is produced. So maybe, Mr. Walker, what we  
10:15:04 5 need to do, and I am thinking out loud, and y'all can weigh  
6 in on this, is you produce the record to the -- you know,  
7 not only to me but to the interested parties, and once it's  
8 produced, then y'all meet and confer and come up with a  
9 schedule.

10:15:31 10 Mr. Thompson, you may want to consider  
11 amending your complaint, given the new program. I guess  
12 the other issue that we ought to mention, and I am, again,  
13 soliciting your input, is that so far in the eight years I  
14 have been involved in this, I have steadfastly not ruled on  
10:16:04 15 the constitutional issue. If I find for the defendants on  
16 the substantive part, do I have to do that?

17 MR. THOMPSON: Well, Your Honor, I think -- I  
18 think the answer to that hypothetical is a yes, just  
19 because it would be a live claim, and if we do not get the  
10:16:28 20 relief for which we are asking on the other claims, then  
21 that claim would be before Your Honor.

22 THE COURT: Okay. I was afraid you were going  
23 to say that because that actually appears to me to be  
24 almost an evidentiary-type-hearing problem.

10:16:59 25 My thought is that even though if -- if

1 you amend your complaint, Mr. Thompson, that you would want  
2 to keep that in there, if you so desire, but that I may  
3 stage this and take that up if I have to. So let's just  
4 concentrate, then, on the substantive APA issues. I am  
10:17:36 5 hearing, Mr. Walker, you say that you're not sure how soon  
6 you can produce the record.

7 MR. WALKER: We're aiming for the end of the  
8 month, Your Honor. It could be the first week of November,  
9 so roughly between three and four weeks.

10:17:49 10 THE COURT: Well, why don't we do this? Why  
11 don't we -- you produce the record to the parties the same  
12 time you file it with the Court. I should warn you that  
13 under my local rules that you have -- it's -- you have to  
14 file paper with me when it's over a certain length, and it  
10:18:18 15 certainly sounds like this one is, so you may have to file  
16 a disk and paper as a courtesy copy to the Court.

17 Once the record is produced, the attorneys  
18 get together, come up with you -- what you think is a  
19 reasonable briefing schedule and propose it to me, and  
10:18:46 20 unless I see something, you know, fatally wrong with it,  
21 and then once the briefing is done, I'll probably hold  
22 another hearing, and -- and we will argue on the merits,  
23 and then I'll try to decide it as quickly as I can.

24 Mr. Thompson, why don't I give you  
10:19:17 25 until --

1 Where is my calendar?

2 -- November 4th to file whatever amended  
3 complaint that you desire. I am not ordering you to amend,  
4 but I am allowing you to amend. And then the

10:19:43 5 intervenor-defendants and the government can have to the  
6 end of the month to file whatever answer you want to file  
7 to that amended complaint.

8 MR. THOMPSON: If I may, Your Honor, there may  
9 be one procedural complication with that. I certainly  
10:19:59 10 don't have any objection, but I believe the date the Fifth  
11 Circuit mandate will issue is after the date that you would  
12 like me to file my amended complaint. If I am recalling  
13 Fifth Circuit precedent correctly, it may be an error for  
14 me to attempt to amend a complaint before the mandate has  
10:20:15 15 issued after an appeal.

16 Now, if the parties are so inclined, I  
17 would be happy to move the Fifth Circuit to issue the  
18 mandate more quickly, or resolve it in some other way. I  
19 just wanted to flag that issue for Your Honor.

10:20:28 20 THE COURT: Okay. One more moving piece. I  
21 had not considered that. Thank you for bringing it to my  
22 attention.

23 Well, let's do this. Let's wait for the  
24 record. Once the record is filed, by then we will know if  
10:20:54 25 the mandate is issued, and I'll get notice of that, and

1 then I will issue an order setting out a -- you know,  
2 deadlines for you guys to either amend your complaint if  
3 you want to, and the defendants and intervenors to amend  
4 their answers if they want to. And at the same time, you  
10:21:31 5 can meet and confer and decide your briefing schedule. And  
6 as I said, I'll be open to almost anything y'all agree on,  
7 unless you have me holding a hearing on Christmas or  
8 something.

9 All right. Anything else we can  
10:21:52 10 accomplish today? I didn't anticipate the other moving  
11 part being the mandate.

12 Mr. Hu?

13 MR. HU: Your Honor, I think it is going to  
14 fall on my office to file the paper record with the Court.  
10:22:08 15 The question is, do you want it in binders? Holes punched?  
16 I have no idea how large this record is but --

17 THE COURT: Probably in binders. I hesitate to  
18 say that, because I have -- we can't give away those  
19 binders once the case is over. We tried giving them to  
10:22:28 20 schools and schools don't want them. They send them back.

21 MR. HU: We will take them back.

22 THE COURT: I'll -- yes. I think binders.  
23 It's probably the best way to do it. Otherwise, it's just  
24 going to be boxes and boxes of paper without any kind of  
10:22:46 25 organization.

1 I am hoping Mr. Walker goes back and finds  
2 the record is only a couple hundred pages, but I am  
3 doubting that.

4 MR. WALKER: I'll do my best.

10:22:58 5 THE COURT: All right. Anything from the  
6 intervenor standpoint?

7 MR. WALKER: I just have one more question,  
8 Your Honor, from the government side.

9 THE COURT: Go ahead, Mr. Walker.

10:23:06 10 MR. WALKER: We raised the question here --  
11 Texas raised the question. We spoke to whether the Court  
12 also understands the injunction to apply to the new rule as  
13 it did to the memo. We have expressed our opinion, but  
14 wanted to make sure that the Court shares its opinion.

10:23:19 15 THE COURT: Yes. I am enjoining the new memo,  
16 you know, the new DACA as opposed -- and the old DACA.

17 MR. WALKER: Thank you.

18 THE COURT: Again, though, anybody that is in  
19 the process -- here is my concern about this. The way I  
10:23:44 20 read the new rule, old DACA expires at the end of the  
21 month. There may be people that need to renew during that  
22 time period, and so are y'all going to continue to renew?  
23 You have my permission to do that.

24 MR. WALKER: Yes, Your Honor. We will just  
10:24:10 25 continue basically operating the same way.



1 THE COURT: I mean, I don't want anybody dumped  
2 in the -- in the soup while we're arguing over this.

3 MR. WALKER: Right.

4 THE COURT: Okay. Ms. Perales, you were about  
10:24:22 5 to say something.

6 MS. PERALES: My apologies, Your Honor, I was  
7 hopping up and down a little bit.

8 We wanted to make sure that if the Court  
9 had announced today that the injunction as to the 2012 DACA  
10:24:33 10 memo continues as to the new rule, and that seems to be the  
11 understanding of the plaintiffs and defendants, we just  
12 wanted to make sure that the Court also mentioned that it  
13 has stayed that portion of the injunction that applies to  
14 current DACA recipients.

10:24:51 15 THE COURT: Yes. I am not changing anything  
16 with regard to that, and I would hope that the government  
17 would continue to provisionally continue the old DACA  
18 program as to the people that are already in it.

19 MS. PERALES: Thank you, Your Honor.

10:25:06 20 THE COURT: Because that -- I mean, you're  
21 shaking your head yes, Mr. Walker, I mean y'all are going  
22 to do that, right?

23 MR. WALKER: Yes, Your Honor. We will continue  
24 operating just the way that it has been.

10:25:16 25 THE COURT: All right. Okay. All right. I

1 think that's everything we can accomplish today. We are  
2 waiting on the record and the mandate; and once the mandate  
3 issues, I'll issue an order. Once the record comes out,  
4 y'all get together with a briefing -- and propose a  
5 briefing schedule. All right. Thank y'all.

10:25:36

6 THE MARSHAL: All rise.

7 (Concluded at 10:25 a.m.)

8 COURT REPORTER'S CERTIFICATE

9

10 I, Kathleen K. Miller, certify that the foregoing is a  
11 correct transcript from the record of proceedings in the  
12 above-entitled matter.

13

14 DATE: Oct. 16, 2022 /s/ Kathleen K. Miller

15 Kathleen K. Miller, RPR, RMR, CRR

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